Supreme Court, U. S.
FILED
AUG 30 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1895

THE DOW CHEMICAL COMPANY,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC,
AND
NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF RESPONDENT UNITED STEELWORKERS OF AMERICA IN OPPOSITION

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
Bredhoff, Cushman, Gottesman & Cohen
Suite 1300
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

WARREN PYLE
Angoff, Goldman, Manning, Pyle & Wanger
44 School Street
Boston, Massachusetts 02180

Attorneys for ~~Petitioner~~ Respondent USWA

OF COUNSEL:
BERNARD KLEIMAN
10 South LaSalle Street
Chicago, Illinois 60603

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED 1

COUNTER-STATEMENT OF THE CASE 2

ARGUMENT 6

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Arlan's Department Store of Michigan, Inc., 133 NLRB 802 (1961) 7

Boeing Airplane Co. v. *Aeronautical Industries Lodge No. 751, Int'l Ass'n of Machinists*, 188 F.2d 356 (9th Cir. 1951), cert. denied, 342 U.S. 821, aff'g 91 F. Supp. 596 (W.D. Wash. 1950) 11

Brotherhood of Locomotive Firemen & Enginemen, Lodge 844 v. *Kennecott Copper Corp.*, 338 F.2d 224, 226 (10th Cir. 1964) 10

Children's Rehabilitation Center, Inc. v. *Service Employees*, 503 F.2d 1977, 1980 (3rd Cir.) (Chief Judge Seitz, dissenting), cert. denied, 419 U.S. 1090 (1974) 6, 11

Dow Chemical Co. v. *International Union of Electrical Workers*, 82 LRRM 3169, 3181 (M.D. Fla. 1971), aff'd 480 F.2d 433 (5th Cir. 1973), cert. denied, 415 U.S. 932 7

Dow Chemical Co. v. *Local No. 13744, International Union of District 50, Allied and Technical Workers*, No. 3 94 53, Superior Court for New London County (Nov. 27, 1973) .. 2

Drake Bakeries, Inc. v. *American Bakery & Confectionary Workers*, 370 U.S. 254 (1962) 10

John Wiley & Sons v. *Livingston*, 376 U.S. 543, 550 (1964) .. 9

Local Union No. 721, United Packinghouse Workers v. *Needham Packing Co.*, 376 U.S. 247 (1964) 10

Marathon Elec. Mfg. Co., 106 NLRB 1171 (1953), enf'd. 223 F.2d 338 (D.C. Cir. 1955), cert. denied, 350 U.S. 981 ... 8

Mastro Plastics Corp. v. *NLRB*, 350 U.S. 270 (1956) 4, 7

Page

Minnesota Joint Board, Amalgamated Clothing Workers of America v. *United Garment Manufacturing Co.*, 338 F.2d 195, 199-299 (8th Cir. 1964) 10
Pence Construction Corp. v. *Int'l Union of Operating Engineers, Local 450,* 484 F.2d 398, 401 (5th Cir. 1973), cert. denied, 414 U.S. 1144 7
Textile Workers v. *Lincoln Mills,* 353 U.S. 448, 456 (1957) 8, 11
Trailways of New England, Inc. v. *Amalgamated Association of Street, Electric Railway and Motor Coach Employees,* 343 F.2d 815, 817 (1st Cir. 1965), cert. denied, 382 U.S. 879 .. 10
United Auto Workers (Kohler Co.) v. *NLRB,* 300 F.2d 699, 704, n. 19 (D. C. Cir. 1962), cert. denied, 370 U.S. 911 ... 7
United Elec., Radio & Machine Workers v. *NLRB,* 223 F.2d 338 (D. C. Cir. 1955), cert. denied, 350 U.S. 981 (1956) 8, 11
United Steelworkers v. *American International Aluminum Corp.,* 334 F.2d 147, 149, 150-151 (5th Cir. 1964) 10
United Steelworkers v. *American Mfg. Co.,* 373 U.S. 564, 566 10
United Steelworkers v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578-579, 580 (1960) 6, 9

Statutes

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.)
Section 8(a) (1) (3) and (5) 4
Section 8(a) (5) and (1) 4

Miscellaneous

COX, *"The Legal Nature of Collective Bargaining Agreements,"* 57 Mich. L. Rev. 1, 18, (1958) 6, 11
FELLER, *"A General Theory of the Collective Bargaining Agreement,"* 61 Calif. L. Rev. 663, 798 (1973) 11
SUMMERS, *"Collective Bargaining Agreements and the Law of Contracts,"* 78 Yale L.J. 525, 542-544 (1969) 11

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1895

THE DOW CHEMICAL COMPANY,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC,
AND
NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF RESPONDENT UNITED STEELWORKERS OF AMERICA IN OPPOSITION

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the Court of Appeals properly remanded to the National Labor Relations Board for reconsideration the questions whether, in the circumstances of this case, the Com-

pany committed unfair labor practices by (1) discharging employees striking to protest the Company's unlawful refusal to bargain and (2) unilaterally cancelling the entire collective bargaining agreement.

COUNTER-STATEMENT OF CASE

Petitioner, The Dow Chemical Company, in its statement of the case presents a misleading version of the facts of this case. As a review of the factual summaries in the opinions of the Court of Appeals, the National Labor Relations Board (hereinafter referred to as "NLRB" or "the Board"), and the Administrative Law Judge[1] reflects, this case is not about a "violent" strike nor in any manner about picket line misconduct.[2]

Rather, as those factual summaries reveal, this case is about a course of conduct engaged in by petitioner in the summer of 1971 at its Allyn's Point, Connecticut plant: the critical events began when petitioner unilaterally imposed

[1] These opinions are all set forth in the Appendix to the Petition (hereinafter cited as "Pet. App.").

[2] In all of the opinions in this case, the only mention of petitioner's assertions regarding threats of reprisals and the like is in footnote 21 of the opinion of the Administrative Law Judge. Pet. App. 74a-75a. There, the opinion makes clear that "the record does not permit a ruling on the merits of the aforesaid factual assertions. . . ." Pet. App. 74a. Further, though it has no bearing on this case, we note the ultimate resolution of the state court action as to which petitioner makes mention (Pet. Br. at 6): petitioner's suit against the Union for damages and for a permanent injunction based on allegations of violence and other misconduct on the picket line ended in judgment for the Union; the Superior Court for New London County, Connecticut, denied the Company money damages as well as a permanent injunction, holding that "there was no legal evidence sufficient to justify an award of money damages." *The Dow Chemical Company* v. *Local No. 13744, International Union of District 50, Allied and Technical Workers*, No. 3 94 53, Superior Court for New London County (Nov. 27, 1973).

(and refused to bargain with the Union[3] over) a basic restructuring of part of its operation causing changes in shift schedules, rates of pay, and other conditions of employment; when the employees struck in protest of this unilateral action, Petitioner announced the cancellation of the entire collective bargaining agreement on the ground that the strike was a breach of the agreement's provision prohibiting strikes *except* where the grievance-arbitration procedures of the contract have been exhausted;[4] subsequent to the purported rescission, petitioner fired all employees remaining on

[3] At the time of the operative facts in this case, the employees at Petitioner's Allyn's Point plant were represented by International Union of District 50, Allied and Technical Workers, Local 13744 (now part of the United Steelworkers of America, AFL-CIO-CLC and referred to at all times herein as "the Union").

[4] The no-strike clause at issue in this case is unusual in a significant respect: the clause allowed for strikes after the exhaustion of the grievance-arbitration procedures. See, Pet. App. 4a-5a, n.4. Unlike most collective bargaining agreements, the parties here contemplated the possibility of strikes during the term of the contract. Before the Board, whether the Union had exhausted the grievance-arbitration procedures was a question in dispute which was resolved against the Union. Member Fanning, in his dissenting opinion, accurately characterized the technical nature of the Union's failure to exhaust (Pet. App. 44a, n.4):

> ". . . [A]fter [petitioner] announced its decision and refusal to negotiate concerning it, but indicated willingness to talk about the manner and timing of its implementation, the employees withheld strike action and attempted to utilize the grievance and arbitration procedures in an effort to get the decision changed. In practical effect they had exhausted those procedures when [petitioner's] officials flatly refused the Union's requests to agree to arbitrate the matter in a discussion initiated by [petitioner's] officials the day before they announced they were going to place the shift change into effect on June 7. The employees were apprised of all these developments, and struck rather than accept [petitioner's] unlawfully imposed change in rates of pay and conditions of employment. Even accepting my colleagues' premise that the strike violated the letter of the no-strike clause, the violation was technical in nature and does not warrant [petitioner's] rescission of the contract and withdrawal of recognition."

strike; finally, ten days after the firing of these employees was announced, petitioner withdrew recognition of the Union, claiming the Union no longer represented a majority of the newly-reduced workforce—thus purporting to end a collective bargaining relationship first established in 1954.

Upon consideration of charges filed by the Union, the General Counsel of the NLRB issued a complaint against petitioner, alleging that by the course of conduct just described petitioner had committed a number of unfair labor practices in violation of §§8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§151, *et seq.*) (hereinafter referred to as "the Act"). After a hearing, in which the Union participated as the charging party, the Administrative Law Judge issued an opinion in which he reached the following conclusions, *inter alia*: (1) that petitioner's unilateral action changing shift schedules, rates of pay, and other conditions of employment was an unfair labor practice in violation of §§8(a)(5) and (1) of the Act; (2) that the ensuing strike was in response to this unfair labor practice; (3) that, notwithstanding this Court's decision in *Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270 (1956), the general no-strike provision in the collective bargaining agreement constituted a waiver of the employees' statutory right to strike in protest against unfair labor practices of petitioner which are not "serious" in nature; (4) that petitioner's refusal to bargain was not a "serious" unfair labor practice; (5) that, therefore, the unfair labor practice strike was in breach of contract, and (6) that petitioner's unilateral cancellation of the collective bargaining contract, firing of the striking employees, and withdrawal of recognition of the Union, were permissible responses to this breach. Given these conclusions, the Administrative Law Judge determined that petitioner's conduct should go without remedy, and that the General Counsel's complaint should be dismissed.

A three-member panel of the Board, by a vote of 2-1, the

two-member majority not issuing a written opinion, affirmed the decision of the Administrative Law Judge and adopted his recommended order dismissing the complaint.

The Union filed a petition for review in the United States Court of Appeals for the Third Circuit. Petitioner here intervened in that action. The Court of Appeals remanded the case to the Board for reconsideration of two issues.

First, the court disagreed with the Board's approach of determining whether an unfair labor practice strike is in breach of a general no-strike provision by categorizing the unfair labor practice which caused the strike as "serious" or "non-serious." In the court's view, where there is no explicit waiver in the collective bargaining contract of the employees' right to engage in unfair labor practice strikes, the propriety of an employer's responding to an unfair labor practice strike with the kinds of self-help measures taken here—cancellation of the contract, termination of employees, and withdrawal of recognition of the Union—must be evaluated in light of the other means available to the employer for resolving the dispute which are less destructive of the national policy favoring stability in collective bargaining relationships, *e.g.*, here "the grievance procedure and the arbitral forum." Pet. App. 28a. Accordingly, the court directed the Board to re-examine its decision in light of such considerations.

Second, the court disagreed with the holding of the Administrative Law Judge, and thus the Board, that a strike in breach of a contract automatically gives the employer the right unilaterally to cancel the entire collective bargaining agreement. The court noted that considerations unique to the national labor policy weigh against strict application to collective bargaining agreements of the "material breach" doctrine applied in commercial contract cases. These considerations include the function of the collective bargaining agreement as "a system of industrial self-government" favored by the law and the compulsory nature of the bargain-

ing relationship between union and employer.[5] At a minimum then, the court concluded, determination of the validity of an employer's unilateral abrogation of a collective bargaining agreement must include consideration, *inter alia,* of the adequacy of legal and contractual remedies, whether the employer in good faith sought resort to such remedies, the "degree of fault on the part of the union," and "the likelihood that the contract will be honored for the remainder of the term." Pet. App. 32a-33a. The Board was asked to take such factors into account in reconsidering its decision.

Petitioner here unsuccessfully sought rehearing or rehearing en banc in the Court of Appeals, one judge dissenting from the denial of the latter. The Company's petition in this Court followed. The Board did not file a petition in this Court.

ARGUMENT

This case involves a unique set of facts and doctrines of law which are rarely invoked and as to which there is no true conflict among the circuits. It does not merit this Court's consideration.

We discuss briefly the state of the law as to the two questions that the Court of Appeals remanded to the Board for reconsideration:

1. In reading the petition it is easy to forget that the strike which occurred in this case was an unfair labor practice strike, *i.e.,* its object was not economic gain but to protest an unfair labor practice of the employer. In *Mastro*

[5] The court's analysis in this part of its opinion is illuminated by its citations to *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578-581 (1960); *Children's Rehabilitation Center, Inc.* v. *Service Employees,* 503 F.2d 1077, 1080 (3rd Cir.) (Chief Judge Seitz, dissenting), *cert. denied,* 419 U.S. 1090 (1974); and Cox, *The Legal Nature of Collective Bargaining Agreements,* 57 Mich. L. Rev. 1, 18-19 (1958). Pet. App. 31a-33a.

Plastics Corp. v. *NLRB, supra,* this Court held that the statutory right of employees to engage in strikes against the unfair labor practices of their employers is not waived by a general provision—which, as here, does not explicitly refer to unfair labor practice strikes—in a collective bargaining agreement limiting the right of a union to strike. In a 1961 decision, *Arlan's Department Store of Michigan, Inc.,* 133 NLRB 802, the Board interpreted *Mastro Plastics* to permit implication from a general no-strike clause of a waiver of the right to strike against "non-serious" employer unfair labor practices. The issue has arisen so infrequently that no federal court of appeals until the court below in this case has ever had occasion to pass on the validity of the *Arlan's* limitation to the rule of *Mastro Plastics.*[6]

Moreover, the approach taken by the court below was very much a function of the unique facts of this case. Petitioner had taken advantage of a strike in protest of its own unfair labor practice to fire striking employees, cancel the collective bargaining agreement, and withdraw recognition of the Union. A bargaining relationship of nearly twenty years was thus destroyed. In this extreme set of circumstances, the court concluded that if exceptions be permitted to the rule of *Mastro Plastics,* they must not be such as to permit an employer—through leverage from its own initial wrong—to achieve ends destructive of the system of collective bargaining, while eschewing peaceful means of resolving the underlying dispute. There is no reason for this Court to review that conclusion.

[6] Petitioner is able to support its claim that there is a conflict on this issue by reference only to one district court decision, *Dow Chemical Co.* v. *International Union of Electrical Workers,* 82 LRRM 3169, 3181 (M.D. Fla. 1971), aff'd. 480 F.2d 433 (5th Cir. 1973), *cert. denied,* 415 U.S. 432, and to *dicta* in two court of appeals decisions, *Pence Construction Corp.* v. *Int'l. Union of Operating Engineers, Local 450,* 484 F.2d 398, 401 (5th Cir. 1973), *cert. denied,* 414 U.S. 1144; *United Auto Workers (Kohler Co.)* v. *NLRB,* 300 F.2d 699, 704, n. 19 (D.C. Cir. 1962), *cert. denied,* 370 U.S. 911.

2. Assuming, *arguendo,* the union's strike in protest of petitioner's unfair labor practice was in breach of the collective bargaining agreement, the second issue which the court directed the Board to reconsider is reached. The opinion of the Administrative Law Judge, adopted by the two-member Board majority, relied on a 1953 decision of the Board, enforced by a 1955 decision of the District of Columbia Circuit, as basis for the proposition that a union's strike in breach of contract justifies, under the doctrine of material breach imported from general contract law, the employer's unilateral cancellation of the entire collective bargaining agreement. See, *Marathon Elec. Mfg. Co.,* 106 NLRB 1171 (1953), *enforced sub nom., United Elec., Radio & Machine Workers* v. *NLRB,* 223 F.2d 338 (D.C. Cir. 1955), *cert. denied,* 350 U.S. 981 (1956). However, appropriate such a rule may have seemed in 1955, the ensuing 20 years have seen developments in the law that render the *United Electrical* decision wholly obsolete.

Two years after *United Electrical,* this Court first declared that the substantive law governing collective bargaining agreements is to be fashioned by the federal courts "from the policy of our national labor laws," *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 456 (1957). The Court explained that the general law governing contracts was *not* applicable, and that while courts might look to it for analogies, the incorporation of such analogous principles would be proper only insofar as "compatible with the purpose of" national labor policy, id. at 457.

Subsequent decisions of this Court have demonstrated the incompatibility of the doctrine of *United Electrical* with "the policy of our national labor laws."

In *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578-579, 580 (1960), this Court described the unique nature of a collective bargaining agreement:

> "A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations. Rather it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces. The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time.
>
> * * * *
>
> ". . . It is more than a contract; it is a generalized code . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant."

Again, in *John Wiley & Sons* v. *Livingston,* 376 U.S. 543, 550 (1964), the Court emphasized the special nature of the relationship between the parties to a collective bargaining agreement:

> "Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance . . . and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship."

In *Drake Bakeries Incorporated* v. *American Bakery & Confectionary Workers,* 370 U.S. 254 (1962), and *Local Union No. 721, United Packinghouse Workers* v. *Needham Packing Co.,* 376 U.S. 247 (1964), the Court made clear

that the federal substantive law applicable to collective bargaining agreements does not favor the unilateral abrogation of contractual obligations; remedies on the agreement, not in derogation of it, serve the national labor policy:

> "The preferred method for settling disputes was declared by Congress to be '[f]inal adjustment by a method agreed upon by the parties' (§203(d) of the Act, 29 U.S.C. §173(d)). 'That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play' (*United Steelworkers* v. *American Mfg. Co.*, 373 U.S. 564, 566). Under our federal labor policy, therefore, we have every reason to preserve the stabilizing influence of the collective bargaining contract in a situation such as this."

Drake Bakeries, supra, 370 U.S. at 263-264.[7]

In the light of these developments, the holding in *United Electrical* cannot be considered to have present force.[8] Petitioner's reliance on that decision, as well as another pre-

[7] Numerous federal court of appeals decisions have followed *Needham* and *Drake Bakeries*. See, *e.g., United Steelworkers of America* v. *American International Aluminum Corp.*, 334 F.2d 147, 149, 150-151 (5th Cir. 1964); *Brotherhood of Locomotive Firemen & Enginemen, Lodge 844* v. *Kennecott Copper Corp.*, 338 F.2d 224, 226 (10th Cir. 1964); *Minnesota Joint Board, Amalgamated Clothing Workers of America* v. *United Garment Manufacturing Co.*, 338 F.2d 195, 199-299 (8th Cir. 1964); *Trailways of New England, Inc.* v. *Amalgamated Association of Street, Electric Railway and Motor Coach Employees*, 343 F.2d 815, 817 (1st Cir. 1965), *cert. denied*, 382 U.S. 879.

[8] The *United Electrical* decision has been uniformly criticized by the commentators. See, *e.g.*, SUMMERS, *"Collective Bargaining Agreements and the Law of Contracts,"* 78 Yale L.J. 525, 542-544 (1969); Cox, *"The Legal Nature of Collective Bargaining Agreements,"* 57 Mich. L. Rev. 1, 18 (1958); FELLER, *"A General Theory of the Collective Bargaining Agreement,"* 61 Calif. L. Rev. 663, 798 (1973).

Lincoln Mills decision,[9] as showing a conflict with the decision below is thus misplaced. Pet. Br. at 14. Similarly, petitioner does not establish a conflict among the circuits by the citation of a previous Third Circuit decision[10] which the court below treated by distinguishing its facts and, "[i]n the more general circumstances presented here," adopting the views of the dissenting judge. Pet. App. 31a; Pet. Br. 14.

In sum, the circuits are not in conflict, and the decision of the court below is a proper application of the principles governing collective bargaining agreements which this Court has enunciated.

[9] *Boeing Airplane Co.* v. *Aeronautical Industries Lodge No. 751, Int'l. Ass'n. of Machinists*, 188 F.2d 356 (9th Cir. 1951), *cert. denied*, 342 U.S. 821, *aff'g.* 91 F. Supp. 596 (W.D. Wash. 1950).

[10] *Children's Rehabilitation Center, Inc.* v. *Service Employees Int'l. Union, Local 227*, 503 F.2d 1077 (3rd Cir. 1974), *cert. denied*, 419 U.S. 1090.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
Bredhoff, Cushman, Gottesman & Cohen
Suite 1300
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

WARREN PYLE
Angoff, Goldman, Manning, Pyle & Wanger
44 School Street
Boston, Massachusetts 02180
Attorneys for ~~Petitioner~~ Respondent USWA

OF COUNSEL:
BERNARD KLEIMAN
10 South LaSalle Street
Chicago, Illinois 60603